

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

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Amendment of the Commission's Rules)

Regarding Installment Payment Financing)

for Personal Communications Services (PCS))

Licenses)

)

WT Docket No. 97-82 /

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby submits its reply comments on the Further Notice of Proposed Rulemaking in the above-captioned proceeding.¹ As might be expected, the comments add little to the debate that began this past January about how the Commission should reauction numerous major market C and F Block Personal Communications Services ("PCS") licenses recovered from NextWave Personal Communications Inc. and other set-aside licenses.² Proponents of small business set-asides continue to insist vigorously that "nothing has changed" even though there are many industry changes documented in the record that undermine any rationale for a set-aside of spectrum for small businesses."³ As Nextel and numerous other entities that have substantial operational experience in the Commercial Mobile Radio Services ("CMRS") business have explained, the

¹ Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Further Notice of Proposed Rulemaking*, WT Docket 97-82, FCC 00-197 (rel. June 7, 2000) ("*Further Notice*").

² See Auction of C and F Block Broadband PCS Licenses, *Public Notice*, DA 00-49 (rel. Jan. 12, 2000); *Further Notice* at ¶1, n.3 (listing of proceedings in response to the January 12 announcement of the reauction).

³ See, e.g., PCIA Comments at 5 ("no changes, technological or otherwise, have occurred in the PCS marketplace . . ."); TeleCorp PCS, Inc. and Tritel Communications, Inc. Comments at 1 ("there have been no fundamental changes in the industry"); Leap Wireless International Comments at 5 ("there have been no new facts presented"). These are commenters with "Big Business" financials trying to claim "small" business status for competitive advantage.

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fundamental assumptions behind the original decision to set aside PCS spectrum have not proven valid and no longer exist. Consumers will continue to suffer as spectrum lies fallow unless the rules are changed.

The record demonstrates that open bidding on all available PCS licenses is essential to fulfilling Congress' overriding purpose in passing the Omnibus Budget Reconciliation Act of 1993 – the expeditious provision of wireless communications service to the public. If a set-aside is, however, maintained, it should be limited to one-third of the 30 MHz C Block licenses, 10 MHz, in markets below 1 million POPs, with all 15 MHz C Block and 10 MHz F Block spectrum available for open bidding. Finally, if some spectrum remains set-aside for small businesses, the grandfathering exception must be eliminated. The grandfathering provision is antithetical to the very policy rationale used to justify any continued small business set-aside.

I. ALL LICENSES SHOULD BE AVAILABLE FOR OPEN AUCTION.

Over the past six months, Nextel and other wireless carriers have set forth in detail the numerous market and structural changes that have occurred in the CMRS industry since small business set-asides were first adopted in 1994.⁴ Ignoring the record thus established, and contrary to the interests of consumers, small business set-aside proponents continue to insist that the current rules should be maintained.⁵ While keeping some broadband PCS spectrum set aside for small businesses has an undeniable appeal to its purported beneficiaries, the record establishes that true small businesses – those with assets of less than half a billion dollars – have not, and likely cannot, fund spectrum acquisition, network build-out and provide competitive wireless services.

⁴ See, e.g., *Further Notice* at ¶ 2, n.8.

⁵ See, e.g., Advanced Telecommunications Technology, Inc. Comments at 1; OPM Auction Co. Comments at 5; Burst Wireless Comments at 2; Wireless Solutions Comments at 2.

A. Market-Skewing Attempts to Promote True Small Businesses Are Doomed to Fail.

Nextel showed in its comments that in today's highly competitive CMRS marketplace, a true small business cannot viably obtain, build and operate a broadband PCS license.⁶ Based on its own experience in building a nationwide CMRS network, Nextel analyzed the costs a new entrant would incur to build and operate a 10 MHz CMRS system competitive with incumbent CMRS services. Given the cost of acquiring spectrum, and the even greater capital expenses required to enter the market with a competitive product *vis-à-vis* "mature" CMRS incumbents, few, if any, small businesses will be successful. Indeed, as numerous commenters have shown throughout this proceeding, in the past five or six years the CMRS market has moved from one characterized by numerous local carriers to a market of nationwide service providers that leaves little room for unaffiliated small business operators.⁷ Further, many of the "small business" success stories touted in the comments are not the independent small businesses envisioned by the Commission when small business set-asides were first developed. Instead, they are pseudo-"small" businesses such as AT&T affiliates Tritel and TeleCorp -- or Leap with its "nonattributable" backer Qualcomm. While these entities may or may not artfully meet the letter of the Commission's small business rules for the C and F Block reauction, they are not entities unable to participate in the market for spectrum with other wireless carriers such that special spectrum set-asides are either deserved or desirable.

⁶ Nextel Comments at 13-16.

⁷ See, e.g., *Further Notice* at ¶¶ 2, 25. See also Vincent D. McBride Comments at 1 (small business licensee commenting on the difficulty in building out his market while "competing with national companies offering one-rate plans"); Alpine PCS Comments at 14 (describing difficulties of entrepreneur licensees in obtaining roaming and affiliation agreements with non-entrepreneur licensees). It is also telling to note that VoiceStream Wireless, formerly an advocate of eligibility restrictions, now recognizes that spectrum set-asides in larger markets "in the previous auctions has resulted in limited provisions of service by entrepreneurs." VoiceStream supports eliminating these restrictions so that carriers with the

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Although the odds of success are against them, many true small business commenters urge the Commission to continue with current set-asides, saying that they want the opportunity to obtain and build these licenses.⁸ These small businesses, however, fail to address market realities. Even with set-asides, the market is stacked against them because of the very dynamics of the auction process and the small business ownership requirements of the Commission's rules. Indeed, it is implicit in their pleas for continued set-asides and ever larger bidding credits that small businesses cannot pay the true market value of these licenses.⁹ What will happen, therefore, if a closed auction is held, is that these true small businesses will once again be squeezed out of the bidding by "pseudo" small businesses just like they were in the original auction, either, if current rules are maintained, by now-large entities such as Leap, TeleCorp and Tritel, or by new "non-small" entities planning to take advantage of the arbitrage between the value placed on the spectrum by large and small businesses.¹⁰ In short, while some may be sympathetic to a continued set-aside, in reality, any market-skewing set-aside will not benefit the true small businesses it is intended to help.¹¹ Set-asides should, therefore, be eliminated for all licenses available for reauction.

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requisite "resources and expertise to operate PCS systems" may obtain spectrum. VoiceStream Wireless Comments at 4.

⁸ See generally Alaska DigiTel, LLC Comments; Poplar PCS, LLC and Eldorado Communications, LLC Comments; America Connect, Inc. Comments; Twenty First Wireless, Inc. Comments; Polycell Communications, Inc. Comments.

⁹ Obviously no set-aside would be needed if small businesses were willing to pay for their licenses at levels equivalent to those of large businesses.

¹⁰ There is nothing in the current rules to prevent a venture capital firm that fits under the revenue and asset caps from obtaining licenses for the primary purpose of an eventual license "flip" to a large entity that values the spectrum more highly than what small businesses are willing and able to pay. Consumers, of course, will be the true losers under such a scenario as real service build-out is further delayed.

¹¹ Because of the arbitrage opportunity, at the close of the reauction, current small businesses will not find that like-minded entrepreneurs willing to enter into favorable roaming agreements or resale arrangements have purchased the major market licenses. See, e.g., Alpine PCS Comments at 14; ASCENT Comments

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B. No Small Business Can Point to a Record of Success in Broadband PCS Major Markets.

Small business set-aside proponents do not, and cannot, deny that the record of small business success in building major market PCS systems is dismal at best.¹² Some argue that eliminating the installment payment program has cured all C Block ills;¹³ none, however, has seriously disputed the fact that small businesses tend to succeed in endeavors tailored to the resource requirements typically associated with small businesses and tend to fail when they reach beyond their means. Indeed, the small business success stories cited again in the comments make plain that the few small business successes that have occurred in PCS are in secondary and rural markets.¹⁴

If, inexplicably, the Commission determines to maintain any form of small business set-aside, it should be limited to one of the three 10 MHz C Block licenses in markets where small

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at 8. Rather, either the *large* “small businesses” will purchase these licenses and integrate them into their current networks, or “buy, hold and flip” investor-entities will obtain the licenses and make the minimum investment necessary to meet five-year build out requirements. In contrast, small businesses, even without a set-aside, may be able to obtain the secondary and rural market licenses for which they are best suited. For example, CFW Communications, the small business success story touted by PCIA in its comments, has recently announced plans to purchase non-set-aside licenses from AT&T Wireless. See PCIA Comments at 9; dowjones.com, *CFW Communications to Buy AT&T Wireless PCS Spectrum Licenses* (June 26, 2000) <<http://dowjones.wsj.com>>.

¹² As SBC Communications points out, only 2.3 percent of C and F Block licenses were operational as of May 2000. See Comments of SBC Communications at 4.

¹³ See, e.g., Rural Telecommunications Group and the Organization for the Promotion and Advancement of Small Telecommunications Companies Comments at 5 (in discussing the Commission’s former installment payment program: “the failure of this one portion of competitive bidding for designated entities does not justify abandoning the rest of the program which has been quite successful.”). These commenters refuse to acknowledge the vast market changes that make set-asides no longer viable. Further, elimination of the installment payment program does not alleviate the potential problem of bankruptcy for the Commission. If undercapitalized entities are permitted to obtain licenses they are still at risk of economic failure, and while the licensee might not bring suit against the Commission for fraudulent conveyance or some other bankruptcy theory, the undercapitalized entity’s creditors very well might.

¹⁴ See PCIA Comments at 9; Leap Wireless Comments at 11; TeleCorp and Tritel Comments at 4.

businesses at least have a chance of success: markets below 1 million POPs. While any cut-off will be somewhat arbitrary, commenters agree that 1 million POPS is a rational cut-off given small business resources.¹⁵ As AT&T Wireless notes, “[i]f the Commission decides to base the C block set aside on population, it should ensure that the parties eligible to bid on the majority of the licenses also are those that have the wherewithal to provide service to customers quickly and efficiently.”¹⁶ The Commission should not, however, adopt the proposal of SBC Communications to make set-aside spectrum available to both small businesses and “new entrants.”¹⁷ To do so would completely negate any policy reason behind a small business set-aside and guarantee that a few large carriers filling out their footprints would dominate the set-aside spectrum.

Available F Block and the 15 MHz C Block licenses also should not be restricted to small businesses. Even small business commenters agree that it is irrational to restrict bidding on the 15 MHz licenses that have gone unsold before,¹⁸ and the F Block spectrum should be open to all bidders to ensure prompt build-out.¹⁹

II. THE GRANDFATHERING EXCEPTION TO THE SMALL BUSINESS ELIGIBILITY RULES SHOULD BE ELIMINATED.

With the exception of carriers who stand to benefit directly from the “grandfathering” exception, large and small carriers agree that if some small business spectrum set-aside is maintained, the “grandfathering” exception that would allow otherwise large carriers to participate in bidding on reauction spectrum reserved for small businesses should be

¹⁵ See Nextel Comments at 12-13; AT&T Wireless Comments at 7-8; VoiceStream Comments at 5; SBC Communications Comments at 3-8; U S WEST Wireless Comments at 5; Verizon Comments at 14, n.13.

¹⁶ AT&T Wireless Comments at 8.

¹⁷ SBC Communications Comments at 9-10.

¹⁸ See *e.g.*, Leap Comments at 19, n.30.

¹⁹ See, *e.g.*, VoiceStream Comments at 6; SBC Communications Comments at 10.

eliminated.²⁰ As OPM Auction Co. points out, “[t]here is little policy justification for extending eligibility to an entity in November 2000’s reauction simply because that entity qualified as a [designated entity] over four years ago.”²¹ Thus, real small businesses oppose grandfathering as the skewing of the playing field against them. Further, as BellSouth notes, “[g]randfathering’ is inappropriate for those that are no longer entrepreneurs and inequitable if continued for them vis-à-vis entities that truly are small and very small businesses.”²² The grandfathering exception to the Commission’s small business auction eligibility rules should be eliminated as contrary to the policy reasons behind any continued set-aside.²³

If, however, a grandfathering exception is maintained, it should be limited to only entities in which there has been less than a 20 percent change in ownership since the original C Block auction.²⁴ As Alpine PCS points out, the “limited extension of grandfathering rights contemplated providing equitable relief to individual applicants whose businesses grew through constructing and operating systems acquired in the initial C Block auction, not through mergers involving other applicants and their systems. To the extent that such mergers occur, they do not involve the same ‘applicant’ or even the same assets that justify the extraordinary grandfathering relief accorded to individual applicants.”²⁵

²⁰ Similarly, as Nextel explained in its comments, the Commission must also review its rules on reporting “total assets” for purposes of determining whether an entity qualifies under the “entrepreneur block” \$500 million asset cap, and must require applicants to present an accurate picture of themselves by reporting total assets as of the short-form filing deadline. Nextel Comments at 20-23.

²¹ OPM Auction Co. Comments at 10.

²² BellSouth Comments at 11.

²³ Under no circumstances should the grandfathering exception be expanded, as some commenters propose. *See, e.g.,* AirGate Wireless Comments at 9 (the Commission should grandfather all existing C and F Block licenses).

²⁴ Nextel Comments at 20.

²⁵ Alpine PCS Comments at 16.

In contrast, the entities most interested in the grandfathering provision, TeleCorp and Tritel, argue for expanding the grandfathering exception to encompass any successor entity that would qualify for *pro forma* treatment under the Commission's transfer of control rules.²⁶ The Commission should not adopt this proposal. The *pro forma* transfer procedures were instituted to conserve Commission resources by allowing licensees to change their corporate structure without seeking prior Commission approval.²⁷ The Commission determined, however, that it would not apply *pro forma* procedures to small business set-aside licenses because such transactions "must be carefully scrutinized to ensure that the proposed transaction, even if *pro forma* in nature, would not violate any of our unjust enrichment rules."²⁸ Because the *pro forma* procedures allow changes in control that affect small business status, they cannot be used to determine whether an entity qualifies for continued small business benefits.²⁹

The revenue and asset eligibility cut-offs set levels above which companies were presumed not to need special treatment to compete in the broadband PCS auctions.³⁰ Accordingly, businesses that have grown above those levels should not be eligible to bid on set-

²⁶ TeleCorp PCS and Tritel Communications Comments at 12.

²⁷ See Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers and Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services, *Memorandum Opinion and Order*, 13 FCC Rcd 6293 (1998).

²⁸ *Id.* at ¶ 25.

²⁹ Similarly, the Commission should not adopt the broad *de facto* or *de jure* control test proposed by Dobson Communications. See Dobson Communications Comments at 12 (if *de facto* and *de jure* control of the auction applicant remain the same, grandfathering eligibility should pass to the new entity).

³⁰ See, e.g., Implementation of Section 309(j) of the Communications Act-Competitive Bidding Narrowband PCS and Amendment of the Commission's Rules to Establish New Narrowband Personal Communication Services, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175 at ¶ 83 (1994) ("The \$125 million gross revenue/\$500 million asset caps have the effect of excluding the large companies that would easily be able to outbid designated entities and frustrate Congress' goal of disseminating licenses among a diversity of licensees.").

aside spectrum.³¹ Further, as Verizon notes, because the Commission has determined to open at least some spectrum in all markets to bidding by non-small businesses, elimination of the grandfathering exception will not work a hardship on formerly small entities because they will not be foreclosed from participating in the reauction.³² Thus, no policy reasons, and no prior promises, can be cited to support continued retention of the grandfathering exception. To the extent that small business set-asides are maintained, Nextel urges the Commission to limit them only to true small businesses by eliminating the grandfathering exception to the small business eligibility rules.

III. AN OPEN AUCTION BEST SERVES THE PUBLIC INTEREST.

The Commission is not in the middle of any “game” for which the rules cannot, or should not, be changed.³³ As the courts have recognized, entities operating in a highly regulated industry have no expectation rights that current regulations will remain the same.³⁴ Indeed, rather than blindly sticking to the *status quo*, the Commission is under an obligation to review its rules in light of the changed circumstances in the wireless industry since small business set-asides were first adopted.³⁵ Given that the record strongly supports an open auction, the

³¹ The U.S. Small Business Administration, for example, requires entities to certify anew that they comply with the size limitations for a program when benefits are applied for, regardless of whether the entity is currently receiving benefits under the same or another program. The U.S. Small Business Administration has been silent in this proceeding on the issue of the grandfathering exception. *See generally* Office of Advocacy, U.S. Small Business Administration Comments.

³² Verizon Wireless Comments at 17.

³³ *See* Powertel Comments at 2; ComScape Telecommunications Comments at 1.

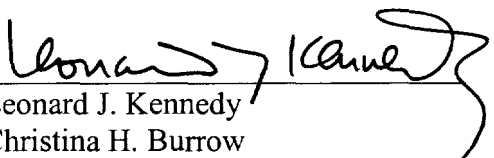
³⁴ The Supreme Court has consistently held that entities in a regulated industry have no right to expect that rules will remain unchanged, stating that “the property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish or modify pre-existing interests.” *United States v. Midwest Video Corp.*, 406 U.S. 649, 674 n. 31 (1972) (quoting *General Telephone Co. of Southwest v. United States*, 449 F.2d 846, 863-64 (5th Cir. 1971)).

³⁵ *See, e.g.*, Verizon Comments at 8, n.6.

Commission should issue rules consistent with removing all set-asides for the upcoming PCS reauction without delay. Consumers are the forgotten ones in this proceeding as they wait years for service from spectrum that was supposed to be put to use promptly. The Commission must meet its public interest obligations by adopting auction rules that meet the mandates of Section 309(j).

Respectfully submitted,

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June 30, 2000

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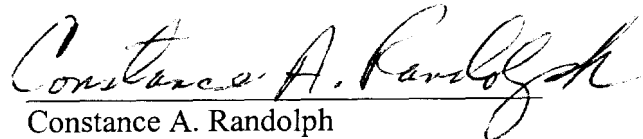
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